STATE OF MICHIGAN

COURT OF APPEALS

THOMAS F. SCHUPRA,

Plaintiff/Counterdefendant-Appellant,

v

THE WAYNE OAKLAND AGENCY,

Defendant/Counterplaintiff-Appellee,

and

LARRY H. GOLTZ, DAWN BLAZICEK, CINDY COMMISSO, and JAMES FOWLER,

Defendants-Appellees,

and

ALLMERICA FINANCIAL CORPORATION and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants.

UNPUBLISHED
May 22, 2008

No. 277585
Oakland Circuit Court
LC No. 2005-064972-CH

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff Thomas Schupra appeals as of right from an order granting summary disposition to defendants[1] under MCR 2.116(C)(10). We affirm.

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[1] The term "defendants" in this opinion refers to defendants-appellees. During the course of the lower court proceedings, plaintiff dropped his claims against Allmerica Financial Corporation (continued…)

Plaintiff, an insurance agent, signed a contract with defendant Wayne Oakland Agency (WOA), providing that he would work as an independent contractor soliciting business for WOA. Plaintiff later voluntarily terminated his relationship with WOA and sought, under the terms of the contract, certain post-termination commissions, as well as the transfer of his "Schupra customers" to the Glenn Maas agency (GMA), a different insurance agency with which he was planning to begin an association. In the meantime, WOA claimed that they had been planning to terminate plaintiff's contract before they even received plaintiff's notice of termination, because plaintiff had been engaging in improper business activities. These activities, according to defendants, included plaintiff's charging illegal $55 fees, selling insurance directly from his home instead of going through WOA and sharing the commissions with WOA, and disclosing confidential information to GMA, a competitor.

Plaintiff sued defendants, alleging breach of contract, promissory estoppel, unjust enrichment, common law conversion, statutory conversion, civil conspiracy, tortious interference with a business relationship, and a violation of the "procuring cause" doctrine. WOA countersued, alleging breach of contract.[2] Defendants then moved for summary disposition concerning plaintiff's complaint and WOA moved for summary disposition concerning the counter-complaint, and the trial court granted their motions. The trial court ruled that plaintiff's breach of contract claim was unavailing because plaintiff himself was the first to breach the contract. It also ruled that plaintiff's conversion, conspiracy, and "procuring cause" claims were unavailing because they all arose from the breach of contract and were "thus barred due to [p]laintiff's initial substantial breach."[3] With regard to the promissory estoppel and unjust enrichment claims, the court ruled that these claims were unavailing because the parties had an express contract covering the subject matter. The court also stated, without elaboration, that summary disposition was appropriate concerning WOA's breach of contract counterclaim.

On appeal, plaintiff contends that the trial court erred in its summary disposition ruling because there were questions of fact concerning whether the "first breach" doctrine barred his breach of contract claim.

(…continued)

and Citizens Insurance Company of America. While it was alleged below that there had also been a stipulation to dismiss the individual defendants-appellees from the case (leaving The Wayne Oakland Agency as the sole defendant), no such stipulation is located in the lower court record. Therefore, in this opinion we refer to the plural "defendants."

[2] The complaint and counter-complaint contained additional claims, but they will not be discussed in this opinion because they were dismissed below on other grounds and are not at issue in this appeal.

[3] The court did not directly rule from the bench concerning plaintiff's tortious interference claim. However, the court did state that "all claims sounding in breach of contract are dismissed pursuant to [MCR 2.116(C)(10)]," and the order that was subsequently entered stated that all of plaintiff's claims were dismissed. Moreover, defendants argued in their summary disposition brief that the tortious interference claim was intertwined with the breach of contract claim and was therefore barred by the "first breach" doctrine. It is clear from context that the court dismissed the tortious interference claim because it, like many of plaintiff's other claims, arose from the alleged breach of contract. No party takes issue on appeal with the form of the trial court's ruling.

We review de novo a trial court's decision regarding a motion for summary disposition. *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001). In evaluating a summary disposition motion brought under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the opposing party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

As noted in *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972), a party who first breaches a contract cannot sue the other party for breach of contract. "However, that rule only applies when the initial breach is substantial." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). The Supreme Court has stated that a substantial breach

> can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted).]

Additionally, as noted in *Chrysler International Corp v Cherokee Export Co*, 134 F3d 738, 742 (CA 6, 1998), "Michigan case law indicates that the determination of which breaches are 'substantial' is inextricably tied to the particular facts of the case."

Plaintiff contends that his breaches were not substantial, or that there at least were questions of fact regarding whether they were substantial, because (1) WOA learned about plaintiff's $55 fees by the fall of 1999 but did not sufficiently warn plaintiff about them or take any other action in respect to them, (2) plaintiff's dealing with certain insurance business outside WOA was "a serious matter" but was an insignificant part of his total business, and (3) plaintiff's sharing of certain WOA information with GMA was "problematic" but not a substantial issue.

We disagree that the trial court erred in applying the "first breach" rule in this case. First, the record reveals that plaintiff did in fact breach the contract. The contract mandated that plaintiff not violate any Michigan insurance laws. By accepting certain "service fees," plaintiff did violate the law. Significantly, even if it were debatable whether plaintiff was improperly providing "counseling services" in exchange for the fees, see MCL 500.1240(2) and MCL 500.1232, plaintiff's *own expert witness* admitted that plaintiff's charging of service fees was a violation of the law. The contract also mandated that plaintiff not "on his own account or in association with any other person in any manner solicit and [sic] insurance accounts directly or indirectly, or enter into competition with Agency . . . ." By selling some insurance outside of WOA, plaintiff violated this provision. The contract also mandated that plaintiff "maintain the confidentiality of all information . . . ." By sharing certain WOA information with Maas, plaintiff violated this provision. Moreover, we note that plaintiff, in his appellate brief, essentially does not dispute that he committed misconduct but instead argues that any misconduct was minor.

It is undisputed that the breaches by plaintiff occurred before defendants' alleged breaches. Therefore, the pertinent question is whether plaintiff's breaches were substantial.

Michaels, *supra* at 650. The trial court essentially concluded that there was no genuine issue of material fact regarding whether the breaches were substantial, and we agree.

In an October 18, 1999, letter, defendant Larry Goltz, WOA's president, wrote the following to plaintiff:

> [Y]ou know that you represent the Agency and it's [sic] reputation, and that is why I made the additional compensation available to you. I was not aware of the consulting fees you are charging, however, until your letter was received. I had no idea of the sums of money involved. Michigan insurance law states the following:
>
> "A Counselor's License may be issued to an Agent who gives advice and counsel and charges a fee for such services. The Counselor's exam MUST be passed." *Only persons licensed as counselors may charge fees, etc.*
>
> Unless you have this license, you must stop this practice immediately, or until you obtain this license, as you are putting your Agent's license and therefore, the assets and reputation of the Wayne Oakland Agency, in jeopardy. [Italics added.]

Despite this letter, and despite the warning that he was putting "the assets and reputation of the Wayne Oakland Agency[] in jeopardy," plaintiff continued charging certain $55 fees.[4] Moreover, with regard to plaintiff's selling insurance outside of WOA, plaintiff's own expert witness testified that an activity of that nature could be grounds for terminating a person. Similarly, the witness testified that an agent's sharing of confidential information with a competing agency was unacceptable and could be grounds for termination "if the employee or independent contractor was intentionally using that information to try to damage the agency . . . ." It undisputed that plaintiff shared the information in question with GMA because he was attempting to establish a business relationship with GMA, i.e., he was hoping to leave WOA and join GMA.

We conclude that there was no genuine issue of material fact concerning whether plaintiff substantially breached the contract. Even without considering the other breaches alleged by defendants, the breaches discussed above were significant and numerous. They placed WOA's reputation at risk and also presented them with a risk of financial loss. See, e.g., *Chrysler, supra* at 743. This case represents the type of serious breach as discussed in *McCarty, supra* at 574.

The trial court did not err in dismissing plaintiff's breach of contract claim and the claims associated with it, because plaintiff was the first to breach the contract, and his breaches, collectively, were substantial.

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[4] Although plaintiff testified that WOA's bookkeeper acquiesced in his charging of the fees, this does not change the fact that plaintiff had been warned by WOA's president about the fees and had been asked by him to stop charging them.

Plaintiff next argues that there were questions of fact concerning whether the "impossibility of performance" doctrine excused defendants' nonperformance under the contract. This argument is rendered moot, however, by our holding above.

Plaintiff also argues that the "after-acquired evidence" doctrine should not have been used to render defendants' actions proper. Under this doctrine, after-acquired evidence of wrongdoing that would have resulted in an employer's terminating or otherwise adversely treating an employee can serve to limit the relief available if the employee sues. See *Grow v WA Thomas Co*, 236 Mich App 696, 707-708; 601 NW2d 426 (1999).

> Equitable in nature, the rule is usually applied in a situation involving termination or another adverse employment action to ensure that an employee does not benefit from the employee's own misconduct or misrepresentation. The rationale of the cases applying the rule is that a plaintiff who was not entitled to the employment in the first place cannot claim economic damages for the loss of it. [*Id*. at 710.]

Plaintiff does not explain, in his appellate brief, which evidence constituted "after-acquired evidence" in this case. Accordingly, he has abandoned this issue. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position'"). At any rate, the gravamen of plaintiff's lawsuit involved his alleged entitlement to post-termination commissions and to the "Schupra customers," in accordance with the terms of the contract. All the evidence acquired during discovery that related to plaintiff's first substantial breach of the contract was admissible in order to evaluate the legitimacy of defendants' "first breach" allegation.

Plaintiff also argues that there were questions of fact concerning whether WOA breached the contract. Again, however, this argument is rendered moot by our conclusion above that plaintiff's breach of contract claim was unavailing.

Plaintiff next argues that there were questions of fact concerning his promissory estoppel and unjust enrichment claims. However, the trial court correctly ruled that these claims were untenable because the parties had an express contract covering the subject matter. See *Martin v East Lansing School District*, 193 Mich App 166, 177; 483 NW2d 656 (1992), and *Terry Barr Sales Agency, Inc v All-Lock Co, Inc*, 96 F3d 174, 181 (CA 6, 1996). Plaintiff's attempt to argue that WOA failed to accept the contract as binding is unavailing. Indeed, defendants indicated that they would assume, for purposes of their summary disposition motions, that the contract "governs the parties' relationship."

Plaintiff also argues that there were questions of fact concerning his tortious interference, common law conversion, and statutory conversion claims.[5] However, a review of the complaint

[5] Plaintiff does not set forth an argument regarding the conspiracy claim.

reveals that these claims were all based on defendants' alleged breach of contract. Accordingly, the trial court properly dismissed them under the "first breach" doctrine.

Plaintiff next argues that there were questions of fact concerning his "procuring cause" claim. As stated in *Reed v Kurdziel*, 352 Mich 287, 294-295; 89 NW2d 479 (1958):

> In Michigan, as well as in most jurisdictions, [an] agent is entitled to recover his commission whether or not be has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. . . . In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause.

However, the "procuring cause" doctrine applies only when there is no express contract governing post-termination commissions. See *Clark Brothers Sales Co v Dana Corp*, 77 F Supp 2d 837, 848-849 (ED Mich, 1999). Here, the contract did address that issue, and therefore plaintiff's argument is unavailing.

Plaintiff lastly argues that the trial court erred in granting summary disposition to WOA with regard to WOA's breach of contract counter-claim. We disagree. As discussed above, plaintiff substantially breached the contract as a matter of law, and there was adequate evidence that WOA was damaged by the breaches.[6]

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette

[6] The parties agreed to a consent judgment regarding damages. A judgment was entered for $25,000, representing the amount owning for the breach of contract counterclaim and for case evaluation sanctions. The judgment provided that plaintiff would be allowed to appeal the underlying rulings.